

2015

**Reed Brasher, an Individual, Appellant, v. Vicki Christensen, an Individual, Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REED BRASHER,

Plaintiff and Appellant,

vs.

VICKI CHRISTENSEN,

Defendant and Appellee.

Appellate No: **20141183-CA**

Trial Court No: 130700011

BRIEF OF APPELLEE

Appeal from a final order of the Seventh District Court for  
Emery County, Judge George M. Harmond, Jr.

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Attorneys for Defendant/Appellee

ORAL ARGUMENT REQUESTED

FILED  
UTAH APPELLATE COURTS

JUL 27 2015





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## **JURISDICTION AND NATURE OF PROCEEDINGS**

Appellant appeals from a final order of the Emery County Seventh District Court entered by the Honorable George M. Harmond, Jr. on December 12, 2014. This Court has jurisdiction by assignment from the Utah Supreme Court under UTAH CODE § 78A-4-103(2)(j).

## **STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW**

Appellee accepts the issues that Appellant has framed as being his issues on appeal.

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

Appellee is unaware of any dispositive Constitutional provisions, statutes, rules, or regulations that are determinative of this appeal.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Reed Brasher brought this action against Vikki Christensen, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and declaratory relief.

### **B. Course of Proceedings**

Brasher filed his Complaint on May 28, 2013 and Christensen filed her Answer on June 24, 2013. [R.001-005 and R. 067-071]. Trial was

conducted on July 10, 2014 and the trial court entered its *Order* in favor of Christensen on December 12, 2014 [R. 546].

C. Disposition in the Court Below

The trial court entered its *Memorandum Decision* on September 17, 2014, followed by its *Order* on December 12, 2014.[R.526 and 546]. The trial court's *Order* denied each of Brasher's claims and ruled that (1) the parties did not have a meeting of the minds about Christensen leasing water to Brasher in 2013; (2) that the 2013 Water Use Authorization ("WUA") was not an independent enforceable contract; and (3) that Christensen's promise to allow Brasher to use water in 2013 was conditioned on his purchase of her farm. [R.546-552].

**STATEMENT OF RELEVANT FACTS<sup>1</sup>**

1. Christensen owns 260 acres of real property ("the Farm"), a house, and the rights to use irrigation water, in Emery County Utah. The irrigation water is represented by shares of stock in the Huntington-Cleveland Irrigation Company ("HCIC") consisting of 605.55 shares of stock classified as "A" water, and 175 shares of stock classified as "B" water.

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<sup>1</sup> All facts are the findings of fact taken from the trial court's *Order* [R.546 passim].



2. Brasher does not reside in Emery County, but owns or leases approximately 100 acres of land in the county. Brasher also owns 15 shares of “A” water stock and 90 shares of “B” water stock in the HCIC. The water Brasher owns allows him to irrigate only 45 acres of ground, and he must lease enough water each year to irrigate the remaining ground.

3. Brasher had leased 215 shares of “A” water from Christensen in the year 2012, using the water from April 2012 through the end of the water year, October 31, 2012.

4. HCIC requires those leasing water from HCIC shareholders provide to HCIC a “Water Use Authorization” form (“WUA”), which is provided by HCIC. The WUA authorized HCIC to deliver the shareholder’s water to the third party.

5. In this case, the WUA for 2012 directed HCIC to deliver 215 shares of Class “A” HCIC water stock to Brasher for the water year 2012. Brasher asked Christensen to lease the water to him “until further notice” in 2012, but Christensen declined to do so and informed HCIC of that fact. Brasher wrote Christensen a check for \$1,290.00 for the lease of the 215 shares of water, which Christensen later cashed.

6. In February of 2013, Brasher needed additional water shares in order to qualify for a subsidized federal program to install sprinkler irrigation on

his Emery county property. Brasher called Christensen and asked to lease water as he had done in 2012, but Christensen refused. Brasher called Christensen two more times, and Christensen stated that she did not know if she wanted to lease the water and she wanted to see about selling the farm.

7. On March 10, 2013, Brasher called Christensen and offered \$5,000.00 earnest money to put down on the purchase of the farm and water. Brasher, Christensen, and Nedra Swasey, a friend of Christensen's met on March 13, 2013 at Christensen's home to discuss the sale. Brasher brought with him a blank WUA from HCIC and a blank "Offer to Purchase Real Estate" form. Brasher and Christensen negotiated the sale of the farm, and Swasey filled out the Offer to Purchase.

8. The Offer to Purchase required Brasher to pay \$5,000.00 "Earnest Money deposit paid to Owner with this Offer." Brasher indicated that during the meeting that he had the check to leave the \$5,000.00 earnest money, but did not do so.

9. During the meeting, Brasher filled out the WUA himself. The terms "payable 3/15 each year" was not filled in at the March 13, 2013, meeting, nor was the term "2018." Christensen told Brasher at the meeting that the water would only be leased to him on a year-to-year basis. Brasher took the

WUA with him when he left the meeting, and never provided a copy to Christensen.

10.Brasher left a check for Christensen in the amount of \$1,290.00, for the lease of the water shares. However, Christensen told Swasey prior to the March 13, 2013 meeting that should would not lease Brasher her water shares unless he bought the farm. Christensen believed the offer to lease water was contingent upon she and Brasher finalizing the offer to sell the farm.

11.During the meeting, both parties signed the WUA and the Offer to Purchase Real Estate. Christensen told Brasher that before anything was finally, she had to discuss both offers with her family and attorney. Christensen never cashed the check for the water shares.

12.On March 14, 2013, Brasher called Swasey and Christensen asking if Christensen had made a decision, and Brasher was informed that Christensen needed more time.

13.On March 17, 2013, Brasher called Christensen four times. Christensen did not answer, so Brasher left messages on her cell phone. Brasher called Christensen again on March 21, 2013, and twice on March 24, 2013. Brasher believed at this time that his Offer to Purchase the Farm

had not been accepted, but he had already taken the WUA to HCIC on March 13, 2013.

14. Toward the end of April, Christensen's real estate agent notified Brasher that Christensen wanted a higher price for the Farm. Brasher indicated he was not interested in paying more money for the Farm, so the parties did not pursue the sale of the Farm and associated water.

15. Brasher began drawing water from HCIC in April. Sometime near the end of April or beginning of May, 2013, HCIC made contact with Christensen as to whether she intended to lease the water shares to Christensen for a number of years. This was the first time Christensen knew Brasher was drawing on her water shares. Christensen then took the steps necessary to terminate Brasher's use of the water.

16. After termination of his use of Christensen's water shares, Brasher brought this action, seeking damages for the loss of his alfalfa crop for the year 2013, and for damages to his cattle operation extending over the purported life of the water lease, 5 years, amounting to approximately \$150,000.00.



## **SUMMARY OF ARGUMENT**

The trial court correctly determined that the parties did not have a meeting of the minds to create a binding contract because Christensen's agreement to let Brasher use her water in 2013 was conditioned upon him purchasing her farm.

Additionally, the 2013 WUA was not a separate, integrated, and independently enforceable contract that gave Brasher a right to call for water in 2013 if he did not purchase Christensen's farm.

In making its determinations and fact findings, the trial court had sufficient evidence through Nedra Swasey and Vikki Christensen to support its determination that the 2013 WUA was conditioned upon Brasher purchasing the Farm.

Finally, Brasher's promissory estoppel claim failed because (1) there was no unequivocal promise by Christensen that Brasher reasonably relied upon since their negotiations were nothing more than negotiations; and (2) Christensen did not know that Brasher had relied upon her conditional promise and did not reasonably expect her conditional promise to induce action by Brasher — since she did not intend to lease the water unless it was part of the farm sale.

## ARGUMENT

### **A. The trial court correctly determined that there was no meeting of the minds between the parties to create a binding contract.**

It is a condition precedent to the formation of any contract that the parties have a meeting of the minds and it must be spelled out, either expressly or implicitly, with “sufficient definiteness to be enforced.”<sup>2</sup> Additionally, the issue of whether the parties had a meeting of the minds is reviewed for clear error, reversing only where the finding is clearly erroneous.<sup>3</sup> The analysis depends on whether the parties “actually intended to contract”, with the question of intent left to the trial court’s determination and assessment.<sup>4</sup>

Brasher has not marshaled the evidence in contesting this particular finding by the trial court. Instead, he simply argues that the trial court got tangled up in the Offer to Purchase the farm and therefore missed an apparently separate oral agreement between Brasher and Christensen that was memorialized by the 2013 WUA.<sup>5</sup>

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<sup>2</sup> *Commercial Union Associates v. Clayton*, 863 P.2d 29, 37 (Utah Ct. App. 1993).

<sup>3</sup> See *Terry v. Bacon*, 269 P.3d 188, 192; 195 (Utah Ct. App. 2011).

<sup>4</sup> *Id* at 195.

<sup>5</sup> As part of his argument here, Brasher uses the word “integrated” as a simile for interrelated or interdependent. Christensen assumes that the use of “integrated” in this argument is different from Brasher’s later contention that the 2013 WUA was an “integrated contract.”

Brasher correctly states that the 2013 WUA and the Offer to Purchase the farm were separate documents. He also correctly states that neither of the documents references the other. But it is far too simplistic to conclude that the two documents are not interrelated. Contract negotiations often include side agreements and conditions. That was the case here —if Brasher bought Christensen's farm, then she was willing to also lease him some additional water for his other properties. If he did not buy her farm, then Brasher was not allowed to use her water.

The trial court found the following:

- Brasher tried at least three times in early 2013 to lease Christensen's water and she declined three times [R.548: ¶18-23];
- Brasher and Christensen finally met one time in March 2013 to discuss leasing the water AND Brasher's interest in purchasing the farm [R. 549:¶24 through 550:¶30];
- At the meeting, Christensen told Brasher that she need to discuss both documents with her family and with her attorney before anything was final [R.551:¶35];
- After the meeting, Brasher could not reach Christensen and she did not return his multiple calls. She also did not cash his check; [R.551:¶36-39].

It is apparent from the testimony at trial and the trial court's findings of fact that Brasher wanted to use Christensen's water and she was not very

interested in leasing it to him. And she did not enter into a lease. Instead, she made it clear to him that if he purchased her farm, she would lease him the additional water that he wanted for his existing property. Accordingly, they negotiated a proposed sale of the farm and the possible use of the water if the sale went through. And Christensen made it clear that she needed to speak with her family and her attorney before anything was final. But Brasher called on the water anyway, trying to enforce a small portion of the parties' negotiations even though it was apparent to the trial court that the 2013 WUA and the Offer to Purchase were interrelated and dependent on each other as a package deal.

Brasher contends that he legitimately believed the 2013 WUA represented a binding contract. Christensen made it clear that, in her mind, Brasher's right to draw water in 2013 was conditional on his purchase of the farm. In other words, the parties did not have a common understanding or intention to contract. And that means there was no meeting of the minds.

**B. The 2013 Water Use Authorization is not, according to its express terms, an integrated or independently binding contract.**

Brasher argues that the 2013 WUA was, by itself, a fully formed and independently enforceable contract. He further argues that it is fully



integrated so that parol evidence could not be introduced at trial to determine the parties' intentions.

1. The 2013 WUA does not contain the required elements for an enforceable contract.

The essential elements of a contract include 1) offer, 2) acceptance, 3) competent parties, and 3) consideration.<sup>6</sup> Brasher contends that all of those elements are present on the face of the 2013 WUA —as long as the tendered check \$1,290.00 is also considered a part of the document.

But virtually none of the required elements for contract formation are present within the 2013 WUA. First, the document is a form between a water owner and the Huntington Cleveland Irrigation Company (“HCIC”) directing the company to deliver water to a third-party lessee.[R.547 ¶13]. It is not an agreement between a water owner and a lessee. It is a document designed to protect HCIC from liability.[R.547 ¶13].

Second, the document specifically states that the WUA is a directive from a water owner to HCIC because the water owner already has “...a lease and/or other agreement” that defines the terms between the water owner and the lessee. [R.551 ¶3]. On its face, the WUA specifically references a

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<sup>6</sup> *Uhrhahn Const. & Design, Inc. v. Hopkins*, 179 P.3d 808, 813 (Utah Ct. App. 2008).

separate agreement between the water owner and lessee that defines their relationship. [R.551 ¶2].

Third, there is no language of offer or acceptance contained within the WUA.

Fourth, there is no consideration for the WUA. The trial court determined that the term “Payable 3/15 of each year” was not part of the WUA when it was signed by Brasher and Christensen. [R.549 ¶32]. Brasher argues that consideration can be found in the tendered-but-never-cashed check for \$1,290.00, but that check constitutes the same kind of extrinsic evidence that he wants to exclude.

Finally, there is no defined term (length of contract) for the WUA. Two options were available and neither box was checked. And the trial court determined that the term “2018” was not part of the WUA when it was signed by Brasher and Christensen.[R.549 ¶32].

Of the four main elements for contract formation, only one — competent parties — existed here with respect to the 2013 WUA.

2. Even if it were a contract, the 2013 WUA was not integrated.

Parol evidence is typically not admissible to vary or add to the terms of an integrated contract.<sup>7</sup> And a contract is integrated if the parties adopted the writing as “a final and complete expression of their bargain.”<sup>8</sup> If a contract is integrated, parol evidence may still be admissible if the contract is ambiguous (i.e. capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies) and the intentions of the parties cannot be determined by the plain language of the agreement.<sup>9</sup>

Here, there was no integration clause for the 2013 WUA stating that it was the final agreement between Christensen and Brasher. Instead, the WUA contains an “anti-integration clause” that specifically states that there is a separate “...lease and/or other agreement” that provides the terms for the Brasher/Christensen transaction.

Additionally, there is no stated consideration due date or term for the contract, except as those were added by someone after the March 2013 meeting but before trial. And there is no defined consideration amount in the WUA at all.

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<sup>7</sup> *Tangren Family Trust v. Tangren*, 182 P.3d 326, 330 (Utah 2008).

<sup>8</sup> *Id.*

<sup>9</sup> *DCH Holdings, LLC v. Nielsen*, 220 P.3d 178, 181 (Utah Ct.App. 2009).

The trial court determined that the 2013 WUA was not an enforceable contract because it was, by its terms, conditioned on a lease or other agreement. [R.551 ¶2]. In other words, it was not a final and complete expression of the Brasher/Christensen negotiations. Presumably, the absence of a consideration amount, due date, and contract term are also other factors considered by the trial court in determining that there was more to the parties' negotiations and bargaining than just the 2013 WUA. And parol evidence was justified to determine the terms of their agreement, if any.

**C. The Trial Court's Findings of Fact are supported by sufficient evidence.**

When challenging a finding of fact, an Appellant must marshal all of the evidence supporting the fact and then explain why the evidence is legally insufficient to support the fact when viewed in a light most favorable to the trial court.<sup>10</sup> And an appellant may not simply re-argue the facts presented at trial.<sup>11</sup>

1. "Brasher filled out the 2013 WUA himself. The term 'payable 3/15 each year' was not filled in at the March 13<sup>th</sup> meeting, nor was the term '2018'".

Brasher contends that "...there is no specific information in the record concerning this finding of fact," although the marshaled facts from Nedra

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<sup>10</sup> Parduhn v. Bennett, 112 P.3d 495, 502 (Utah 2005).

<sup>11</sup> *Id.*



Swasey's testimony specifically support the finding of fact. In support of his argument, Brasher simply re-argues the facts he presented at trial, stating that Swasey's testimony is "qualified" and "unconvincing given the clear and direct testimony offered by Brasher."<sup>12</sup> Brasher even tries to introduce items outside the record by way of a footnote 3, contending that it is "readily apparent" that Brasher did not write the term "2018".<sup>13</sup>

Notably, Brasher also claims that Christensen's statements at trial contradict Swasey. He states that Christensen "acknowledged" that the phrase "payable 3/15 each year" was the date of payment "indicated on the 2013 WUA".<sup>14</sup> But Brasher's use of the word "acknowledged" is a careful mischaracterization of Christensen's statements. Christensen was asked:

Q. With regard to Exhibit 1, immediately to the right-hand side of the designation 215 shares of class A water it states, "Payable 3-15 of each year." Do you see that?

A. Yes.

Q. So was it your understanding the payment was to be made on the 15<sup>th</sup> of March each year of this particular water use authorization?

A. No. [TT.22:18 through 23:5].

In other words, Christensen admitted that the document introduced into evidence, and presented to her at trial, contained the

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<sup>12</sup> See *Appellant's Brief* at 21, ¶2.

<sup>13</sup> *Id* at Footnote 3.

<sup>14</sup> *Id* at p.20.

phrase “payable 3/15 each year” on its face. But she specifically disputed that it was a payment term of the 2013 WUA.

Nedra Swasey specifically testified that at the March 2013 meeting, the 2013 WUA did not contain the same terms as the version Brasher offered at trial. She said:

- “All of it was not written out”;
- The phrase “payable 3-15 of each year” was not written out;
- And Swasey did not remember an ending date on the paper and did not believe that “2018” was filled in when the paper left Christensen’s home. [TT. 205:18 through 206:19].

Admittedly, Brasher disagrees and contradicts Swasey’s testimony. But Swasey’s testimony provides sufficient evidence to support the finding—particularly where the standard of proof is preponderance of the evidence.

2. “Christensen told Brasher [during the March 13, 2013 meeting] that the water would only be leased to him on a year to year basis.”

Brasher contends that this finding of fact is contravened by trial testimony because the only witness to this fact was Nedra Swasey who testified, “Yes. Vikki told [Brasher] it would be on a year-to-year basis.” [TT: 205:18-206:19].

It appears that Brasher believes he is a more reliable witness than Nedra Swasey. He contends that her testimony was “hazy” when compared to his own. But his belief about his own credibility does not make the finding of fact unsupported by the trial testimony. It simply means that the trial court apparently believed Swasey—and not Brasher.

3. “Both parties signed the WUA and the Offer to Purchase but Christensen informed Brasher that she need to discus both offers with her family and with her attorney before anything was final.”.

In support of this fact, Christensen testified at trial several times that she believed the water and the farm purchase were intertwined in the sense that she would only lease the water to Brasher if he also bought the farm. Admittedly, Christensen’s testimony in the transcript is not a model of clarity, but the trial court apparently understood the gist of it in making its findings of fact. Christensen testified as follows:

- “That I cancelled the lease because he had called—I didn’t know he was going to come back and buy the farm, but he just started using water. And they called me on it. And I said, ‘*No, he wasn’t supposed to until I got back with my attorney to see whether I was going to sell it or not.*’ If he---I sold it to him, then I’d rent him that water for a few years. If my attorney and my family didn’t think it was right, then I wouldn’t. And he was already using water.” [TT. 32: 7-16]
- “...I was supposed to be able to go to my attorney and ask if this was okay to sell for this price. And in the meantime, he was going to bring some earnest money, as it shows on here. But he didn’t bring any earnest money. And the next thing, I get a call he was using the

water. *And he was only to use the water if he bought the farm.*" [TT. 53: 19 through 54:1].

- Q. What was your understanding about this document [2013 WUA]?  
A. Well, it was just ---*he was supposed to just hang on until I got--- seen you and got everything done before I said yes, I'll--- it's a go.* And before I done that, he started using water. [TT. 217:8-13].
- A. No. none of it was supposed to be legal.  
Q. What do you mean by that? I think we understand your testimony.  
A. Yeah, that it was not – *I was going to you and a few people to see if it was. And that's what I told him.* I won't---*none of this is good here today.*  
Q. Including this document [2013 WUA]? You wanted to check with others as well, as part of it all; is that correct?  
A. Yeah, on this –on the first one—the real estate.  
**Q. Did you think you were leasing him any water by itself?**  
**A. No.** [TT.217:25 through 218:14].

As with the other findings of fact, there is sufficient evidence in the record to support the trial court's finding.

**D. Promissory estoppel was not a viable cause of action because the water use was conditioned upon Brasher purchasing Christensen's farm.**

The trial court determined that "Christensen's promise to allow Brasher to draw water in 2013 was conditioned upon Brasher purchasing the Farm." [R. 551 ¶7]. Brasher has not really challenged this determination except to re-argue his trial court position.



Most importantly for this case, the first element of promissory estoppel requires a promise by the defendant and an act by the plaintiff in reasonable reliance on the promise.<sup>15</sup> The second element requires that the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action on the part of the plaintiff.<sup>16</sup>

Here, the trial court determined that any promise by Christensen to deliver water in 2013 was conditioned upon Brasher's purchase of her Farm. And a conditional promise does not support a promissory estoppel claim. Instead, it could be characterized as nothing more than a preliminary negotiation.<sup>17</sup>

But the second element is also not met under the trial court's findings either. The trial court determined that "Christensen believed the water lease was part of the Farm sale and ....did not intend to lease the water to Brasher unless he purchased the farm..." [R. 551 ¶6]. The Court also found that the first time Christensen knew Brasher was drawing on her water was in late April or the beginning of May 2013 and "...she took steps to terminate

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<sup>15</sup> *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088, 1092 (Utah 2007).

<sup>16</sup> *Id.*

<sup>17</sup> See *Nunley v. Westates Casing Services, Inc.*, 989 P.2d 1077, 1089 (Utah 1999).

Brasher's use of the water, instructing HCIC to stop allowing Brasher's use." [R. 550 ¶41-42].

Christensen did not know Brasher had relied on the conditional promise and did not reasonably expect her conditional promise to induce action by Brasher since she did not intend to lease the water unless it was part of the farm sale.

Accordingly, under the trial court's findings, Brasher's promissory estoppel claim fails under the first two elements of the claim.

### CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order and award Vikki Christensen her costs on appeal.

SUBMITTED this 27<sup>th</sup> day of July, 2015.

TORGERSON LAW OFFICES, P.C.

By: 

Don M. Torgerson  
Attorney for the Appellee

CERTIFICATE OF SERVICE

On the 27<sup>th</sup> day of July, 2015, I served two copies of the foregoing *Brief of Appellee* on all interested parties as follows:

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By:   
Don M. Torgerson

Certificate of Compliance

Appellee certifies under Utah R. App. P. 24(f)(1)(A) that this brief complies with the word limitation of no more than 14,000 words. The total number of words in the brief is 4083.

TORGERSON LAW OFFICES, P.C.

By:   
Don M. Torgerson  
Attorney for the Appellee



